NA 04-0082-C H/H Tolbert v Con-Way
Judge David F. Hamilton Signed on 6/15/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

CHRISTOPHER TOLBERT,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 4:04-cv-00082-DFH-WGH
	)	
CON-WAY TRANSPORTATION	)	
SERVICES, INC.,	)	
Con-Way Central Express,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

CHRISTOPHER TOLBERT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.4:04-cv-0082-DFH-WGH
	)	
CON-WAY TRANSPORTATION	)	
SERVICES, INC. d/b/a	)	
CON-WAY CENTRAL EXPRESS,	)	
	)	
Defendant.	)	

ENTRY ON MOTION FOR SUMMARY JUDGMENT

The central issue in this lawsuit is whether the defendant fired the plaintiff because he claimed worker's compensation benefits and sought leave under the federal Family and Medical Leave Act of 1993 ("FMLA"). Plaintiff Christopher Tolbert worked as a commercial truck driver for defendant Con-Way Transportation Services, Inc. Tolbert was involved in a serious accident when the truck he was operating struck another commercial truck. Tolbert's injuries required immediate surgery and hospitalization for five days, followed by several weeks of recovery. Tolbert took an FMLA leave of absence and filed for worker's compensation benefits as a result of his injuries. Shortly after the accident, Con-Way fired Tolbert. Con-Way contends it fired Tolbert pursuant to a company safety policy that allows for firing if an employee causes a preventable accident

that results in a total write-off of company equipment. Tolbert alleges that Con-Way's reason is pretextual and that Con-Way fired him in retaliation for taking an FMLA leave and exercising his statutory right to pursue worker's compensation benefits.

Defendant Con-Way has moved for summary judgment. For reasons explained below, the court denies the motion for summary judgment. Tolbert has come forward with evidence raising a genuine issue of fact as to Con-Way's reason for firing him. Tolbert has shown that he was the only Con-Way driver fired for the given reason, though other drivers had engaged in similar conduct.

Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, affidavits, and other materials demonstrate that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Only genuine disputes over material facts can prevent a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it might affect the outcome of the suit under the governing law, and a dispute about a material fact

is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.*

On a motion for summary judgment, the moving party must first come forward and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which the party believes demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Where the moving party has met the threshold burden of supporting the motion, the opposing party must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Local Rule 56.1 requires the party opposing a motion for summary judgment to identify specific and material factual disputes.

When deciding a motion for summary judgment, the court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light reasonably most favorable to the non-moving party. See Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. at 255; *Celotex*, 477 U.S. at 323; *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999). However, a party must present more than mere speculation or conjecture to defeat a summary judgment motion. The issue is whether a reasonable jury might rule in favor of the non-moving party based on the evidence in the record. *Anderson v. Liberty Lobby*, 477 U.S. at 252; *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 637 (7th Cir. 2001); *Sybron Transition Corp. v. Security*

Insurance Co. of Hartford, 107 F.3d 1250, 1255 (7th Cir. 1997). The court should neither "look the other way" to ignore genuine issues of material fact nor "strain to find" material factual issues where there are none. *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1363-64 (7th Cir. 1988).

Undisputed Facts

The following facts are undisputed for purposes of defendant's motion, viewing the record evidence in the light reasonably most favorable to plaintiff Tolbert and giving him the benefit of reasonable inferences from that evidence.

Plaintiff Christopher Tolbert was hired on September 8, 1995, by Con-Way as a supplemental employee. He was laid off in December 1995 and rehired in May 1996 as a supplemental employee. In the fall of 1996 Tolbert became a full-time employee with Con-Way as a commercial truck driver. Tolbert Dep. at 59-60.

On January 10, 2003, Tolbert was driving on a state highway around 7:00 a.m. when he rear-ended another truck. Tolbert Dep. Ex. 13 at 1-2. The collision tore off the front end of Tolbert's truck and threw the engine and transmission onto the pavement. Tolbert Dep. Ex. 12 at 2.

After the accident, Tolbert told the other driver that he had fallen asleep at the wheel. Tolbert Dep. Ex. 13 at 2. Tolbert was bleeding from facial injuries and was taken to a hospital immediately where he underwent surgery to suture

a tear in his small intestine. Tolbert Dep. Ex. 12 at 2–3. When interviewed at the hospital the next day, and still under medication, Tolbert explained that he "did not remember the accident itself. He remembered his head hitting the windshield and his body the steering wheel. He could not remember any sounds or sensors informing him that he had gained on the [other driver]." Tolbert Dep. Ex. 13 at 3.

The Con-Way tractor was a total write-off under company and insurance policies. Pl. Ex. C; Riordan Decl. ¶ 7; Tolbert Dep. Ex. 13 at 3. Con-Way found that the accident was preventable, based on an independent adjuster's investigation and an investigation by Bill McCurry, Safety Supervisor for Con-Way. Riordan Decl. ¶ 5.

The hospital gave Tolbert an initial prognosis of four to six weeks leave from work for recovery before possible release to light duty work for two more weeks. His facial injuries required plastic surgery. Pl. Ex. C. Tolbert filed for worker's compensation benefits and FMLA leave. Complaint ¶ 10. Tolbert's surgery and subsequent condition qualified as a "serious health condition" as defined in the FMLA's governing regulations and as such was subject to coverage by the FMLA. 29 C.F.R. § 825.114; Complaint ¶ 12.

On or about February 12, 2003, Terry Riordan notified Tolbert that his employment was being terminated, citing Con-Way safety policy 811 as the basis

for his decision. Tolbert Dep. at 73–74. Safety policy 811 states in relevant part: "Dependent on the severity of any one preventable accident, or the continued frequency of multiple preventable accidents, disciplinary action can be imposed, up to and including termination of employment. For example, any employee involved in a preventable accident resulting in a death or in 'total write-off' damage to a tractor and/or trailer(s) may be immediately terminated." Tolbert Dep. Ex. 11 at 6. Other relevant facts are noted below, especially those concerning Con-Way's treatment of other drivers involved in similar accidents, keeping in mind the standard that applies on a motion for summary judgment.

Discussion

Tolbert alleges that Con-Way fired him in retaliation for trying to exercise his rights under the law, both by filing for worker's compensation benefits and by claiming FMLA leave to recover from his injuries. He also alleges that Con-Way has interfered with his right to return to work after a medical leave of absence, pursuant to the FMLA. Con-Way claims that it fired Tolbert pursuant to a legitimate company safety policy because he caused a preventable accident that resulted in the total loss of the company truck. All claims depend on Con-Way's reason for firing Tolbert. As explained below, Tolbert has come forward with sufficient evidence to raise a genuine issue of fact about whether Con-Way's stated reason for firing him was honest or a false pretext to mask unlawful motives.

I. *Retaliation in Firing*

Tolbert seeks relief for his worker's compensation claim under Indiana common law stated in *Frampton v. Central Indiana Gas Co.*, where the Indiana Supreme Court held that an employee is entitled to relief from an employer if the employee was fired in retaliation for filing a worker's compensation claim. "Such a discharge would constitute an intentional, wrongful act on the part of the employer for which the injured employee is entitled to be fully compensated in damages." 297 N.E.2d 425, 428 (Ind. 1973).

Tolbert also seeks relief under the FMLA, the federal statute that gives eligible employees the right to twelve work-weeks of unpaid leave during any twelve-month period for specified reasons. Among those reasons is a "serious health condition" rendering the employee unable to perform the functions of his position. 29 U.S.C. § 2612(a)(1)(D). Any eligible employee who takes leave under 29 U.S.C. § 2612 for the intended purposes of the leave has the right to be restored by the employer to the position held by the employee when the leave commenced. 29 U.S.C. § 2614(a)(1)(A). The Act prohibits employers from discriminating or retaliating against employees who exercise their rights under the Act, and from interfering with an employee's attempt to exercise those rights. 29 U.S.C. §§ 2615(a) and (b). Con-Way agrees that Tolbert's surgery and subsequent condition qualified as a serious health condition and that his leave was subject to coverage by the FMLA. Answer at 3.

A. *The Analytic Frameworks*

In *Frampton* cases, Indiana law requires the plaintiff to establish a causal connection between his termination and the filing of a worker's compensation claim. *Goetzke v. Ferro Corp.*, 280 F.3d 766, 774 (7th Cir. 2002). The Seventh Circuit has explained that "Causation may not be inferred merely from evidence that (1) the employee filed for benefits and (2) was fired." *Mack v. Great Dane Trailers*, 308 F.3d 776, 784 (7th Cir. 2002) (applying Indiana law under *Frampton*). The Seventh Circuit added, however, that depending on the circumstances, "causation may be inferred from the 'rapidity and proximity in time' between the employee's filing for benefits and the discharge, * * * or from evidence that the employer's proffered reason for the discharge is 'patently inconsistent with the evidence before the court.'" *Id.*, quoting *Hamann v. Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 (7th Cir. 1990), and *Markley Enterprises, Inc. v. Grover*, 716 N.E.2d 559, 565 (Ind. App. 1999). In essence, the question under Indiana law is whether Tolbert has come forward with evidence that would allow a reasonable jury to infer that Con-Way fired him because he asserted his right to worker's compensation.

Temporal proximity of discharge and notice of a claim may be sufficient, with additional evidence, to raise a genuine issue as to the reason for his discharge. See *Mack*, 308 F.3d at 784.

Under the FMLA, the analytic route is a little longer but it returns to the same question and the same evidence. The Seventh Circuit evaluates a retaliation

claim under the FMLA the same way it evaluates a retaliation claim under other employment discrimination statutes such as Title VII of the Civil Rights Act of 1964. *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir. 2004). Tolbert has no direct evidence of retaliatory motive, so he relies on the indirect method of proof, which is a modified version of the burden-shifting method of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To establish a prima facie case of retaliation under the indirect method of proof, Tolbert must come forward with evidence tending to show: (1) he engaged in statutorily protected activity; (2) he was performing his job according to his employer's legitimate expectations; (3) despite meeting those expectations, he suffered a materially adverse employment action; and (4) he was treated worse than a similarly-situated employee who did not engage in statutorily protected activity. *Buie*, 366 F.3d at 503; *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640, 642 (7th Cir. 2002). If Tolbert can support a prima facie case, the burden of production shifts to Con-Way to articulate a legitimate reason for firing Tolbert, and if it does so, the burden is then back on Tolbert to come forward with evidence that the stated reason is a false pretext masking an unlawful motive. See *Buie*, 366 F.3d at 503; *Stone*, 281 F.3d at 644.

Con-Way challenges Tolbert's claim at the second and fourth prong. First, it contends Tolbert has failed on the second prong: meeting the legitimate expectations of his employers. Totaling one's equipment and causing damage in

excess of $50,000 in a preventable accident can hardly be described as meeting the legitimate expectations of Con-Way. Yet the fact that plaintiff was not meeting his employer's legitimate expectations is not controlling by itself here.

Tolbert alleges that Con-Way's discipline of him was retaliatory. Tolbert has presented evidence that other employees who engaged in similar conduct, *i.e.* who were involved in preventable total write-off accidents, did not seek FMLA leave or worker's compensation and were not disciplined as harshly as he was. Where a plaintiff alleges discriminatory or retaliatory discipline, "the second and fourth prongs of *McDonnell Douglas* merge." *Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 728 (7th Cir. 2004), citing *Grayson v. O'Neill*, 308 F.3d 808, 817 (7th Cir. 2002), and *Flores v. Preferred Technical Group*, 182 F.3d 512, 515 (7th Cir. 1999). In those cases, "there is no question that the employee failed to meet his employer's expectations. Instead, the plaintiff must establish that he received dissimilar – and more harsh – punishment than that received by a similarly situated employee who was outside the protected class." *Lucas*, 367 F.3d 728, citing *Grayson*, 308 F.3d at 817, and *Flores*, 182 F.3d at 515; see also *Kriescher v. Fox Hills Golf Resort and Conference Center*, 384 F.3d 912, 915-16 (7th Cir. 2004) (prima facie case of discriminatory discharge "includes showing that similarly-situated employees who were outside of her protected class were treated more favorably"), citing *Little v. Illinois Dep't of Revenue*, 369 F.3d 1007, 1012 (7th Cir. 2004); *Curry v. Menard, Inc.*, 270 F.3d 473, 478 (7th Cir. 2001).

Accordingly, the issue in defendant's challenge to plaintiff's prima facie case focuses on the fourth element: whether plaintiff can point to similarly-situated employees not members of plaintiff's protected classes who were treated more favorably – *i.e.*, who were not fired despite being involved in a preventable accident resulting in a total write-off of company equipment. Tolbert must first show that these employees were similarly situated. See *Dandy v. United Parcel Service, Inc.*, 388 F.3d 263, 273 (7th Cir. 2004) (stating that the plaintiff has the burden to prove that he is "similarly situated" to comparators by presenting evidence of similar attributes and a cogent analysis).

B. *Applying the Analysis*

Applying these analytic frameworks, the court turns to Tolbert's evidence to support his claims. That evidence includes timing of his assertions of his legal rights and his firing, a letter that Con-Way drafted before he asserted his legal rights indicating that he would not be fired because of the accident, and the undisputed fact that Tolbert is the only driver Con-Way has fired because of a single preventable total-loss accident.

The temporal proximity is close, of course. The accident occurred on January 10, 2003, and Con-Way learned that its tractor was a total loss by January 13, 2003. Con-Way also knew very quickly that Tolbert had been injured requiring hospitalization and would be missing work for a while. See Tolbert Dep. Exs. 12 & 13. A reasonable jury could find that Con-Way immediately expected

a worker's compensation claim and FMLA leave. Con-Way notified Tolbert that he was fired on February 12, 2003, and his appeal of that decision to the company's Safety Review Board was rejected on February 21, 2003.

This temporal proximity is not enough evidence by itself, but Tolbert offers additional evidence. First, he relies on a "Letter of Instruction" drafted by the Con-Way safety department on January 20, 2003 giving him a written warning for the accident, but definitely not firing him. The letter told Tolbert that his driving record had been assessed seven demerit points, leaving a new balance of negative six points. The draft warned that "further incidents of this nature may result in more severe disciplinary action up to, and including, termination of employment." Pl. Ex. B. Tolbert never received the warning letter. He was fired instead.

Tolbert argues that the fact that the warning letter was even prepared undermines the credibility of Con-Way's claim that he deserved to be fired for causing the accident. Con-Way's Manager of Safety William Wright explained that "The Safety Department of Con-Way generates Letters of Instruction as a matter of course, without any input from or communication with the Human Resources Department." Wright Decl. ¶ 2. Con-Way argues that it was therefore never human resource's intention to send this letter to Tolbert, since the decision to fire him had already been made separately. That is an argument Con-Way is entitled to make. However, the safety department's approach to the accident is some

evidence calling into question the company's consistency and the credibility of the policy Con-Way relies upon to justify its decision to fire Tolbert.

Tolbert also relies on evidence of other drivers who were involved in similar accidents. Con-Way produced a list of fifteen drivers who, like Tolbert, were involved in preventable accidents that resulted in total losses of company equipment from December 2001 to December 2003. Of those fifteen, six filed FMLA/worker's compensation claims and nine did not. None of the other employees were fired. Leathers Decl. Ex. 1. Tolbert argues that the nine workers listed on this sheet who did not file any claims were situated similarly and support an inference of retaliation under both Indiana and federal law because they were treated better than he was.

Con-Way argues that five of the nine proposed comparators were not similarly situated because a different director of human resources decided how to handle their cases. Con-Way cites *Timms v. Frank*, 953 F.2d 281, 287 (7th Cir. 1992), in its favor, noting that "It is difficult to say that the difference was more likely than not the result of intentional discrimination when two different decision-makers are involved." However, evidence of a change in directors does not necessarily prevent the comparison, as the *Timms* court noted. *See Timms,* 953 F.2d at 287; citing *Cooper v. North Olmstead*, 795 F.2d 1265, 1271 (6th Cir. 1986) (a change in managers is suggestive of a basis for the difference in treatment, although it is not a complete defense to a discrimination claim). Both

directors were supposedly applying the same policy. And the fact remains that under both directors, Tolbert is the *only* employee fired for one accident under the "total write-off" provision of policy 811. Con-Way's safety policy was never altered, and Con-Way's explanation for the inconsistent implementation of this policy is disputed.

Even if this court were to decide that the change in directors precluded five of the comparators, there remain four potential comparators for Tolbert. These employees were sufficiently comparable in all material respects. Richard Trott, the director of human resources who was responsible for Tolbert's case, also handled their cases. They were involved in preventable accidents that resulted in total losses of company equipment. All of these employees were subject to the same safety policy and standard that 811 presents. They fell outside of Tolbert's protected class because they did not file worker's compensation or FMLA claims, and they did not suffer any adverse employment actions as a result of their accidents. Thus, for purposes of satisfying the fourth prong of Tolbert's prima facie case, the four employees who did not file claims and whose cases were handled by Trott also can serve as proper comparators for Tolbert.

Con-Way emphasizes that Tolbert fails to account for the six drivers who were involved in preventable accidents and took worker's compensation/FMLA leave and were not fired. See Leathers Decl. Ex. 1. Con-Way argues that its treatment of these drivers is evidence that it has not retaliated in the past against

employees who were involved in preventable accidents resulting in total-write off of equipment and did file FMLA/worker's compensation claim. Con-Way has offered a reasonable interpretation of the evidence, but not the only reasonable interpretation of the evidence.

A person using the indirect method to prove unlawful employment discrimination is not required to prove that the employer discriminates against *everyone* who is similarly situated and engaged in the protected activity. The plaintiff must establish "that he received dissimilar – and more harsh – punishment than that received by a similarly situated employee who was outside the protected class." *Lucas v. Chicago Transit Authority*, 367 F.3d at 728, citing *Grayson v. O'Neill*, 308 F.3d at 817, and *Flores v. Preferred Technical Group*, 182 F.3d at 515. Tolbert has come forward with evidence that, during a two year period, nine similarly situated drivers who did not assert rights under federal and state law were not fired for similar driving mistakes. That evidence satisfies his burden on summary judgment, even if Con-Way has a potentially persuasive rebuttal. The case is not before the court as a trier of fact, but only on a motion for summary judgment.

Tolbert has come forward with evidence that would allow a reasonable jury to find unlawful retaliation under Indiana law. He has also come forward with evidence sufficient to show a prima facie case for indirect proof of FMLA retaliation. Con-Way has articulated a legitimate, non-discriminatory reason for

firing Tolbert. its employment action. Con-Way has presented such a reason. It explains that Tolbert was subject to a brief window of company management who adopted a policy of heightened scrutiny of employees who violated safety policy 811. Therefore, the burden shifts back to Tolbert to produce evidence indicating that Con-Way's stated reason is a false pretext.

To meet his burden on the issue of pretext, Tolbert does not need to prove at this stage that it is more likely than not that Con-Way's real reason for firing him was unlawful. Tolbert needs only to present a genuine issue of material fact to survive summary judgment. *Perdomo v. Browner*, 67 F.3d 140, 145 (7th Cir. 1995). Tolbert can do this by providing evidence tending to show that his employer's explanation is not worthy of belief. *O'Neal v. City of New Albany*, 293 F.3d 998, 1005 (7th Cir. 2002). "If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one . . . may reasonably be drawn." *Bell v. Environmental Protection Agency*, 232 F.3d 546, 550 (7th Cir. 2000), quoting *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994). Thus, evidence that calls into question the employer's truthfulness precludes summary judgment. *Bell*, 232 F.3d at 550; *Perdomo*, 67 F.3d at 145.

As explained below, Tolbert has met his burden to present evidence tending to show that Con-Way's explanation regarding his firing after taking FMLA leave

and filing for worker's compensation is pretextual, thus precluding summary judgment for defendant.

The disputed issue is the explanation for why Tolbert remains the only employee to ever be fired by Con-Way under the "total write-off" provision of safety policy 811. Con-Way asserts that after Tolbert's accident, Riordan was directed by Trott (the human resources director at the time of Tolbert's accident) to scrutinize more closely "total write-off" accidents like Tolbert's. Riordan Decl. ¶ 6; Trott Decl. ¶ 6. Immediately following the decision to terminate Tolbert's employment, the new human resources director reversed the direction of the company's safety policy and decided to place more emphasis on a points system rather than on damage to equipment. Leathers Decl. ¶ 4. As a result, no employee before or after Tolbert has been fired under the "total write-off" provision of 811.

It is reasonable to infer that Tolbert found himself the only victim of a short management experiment in applying safety policy 811. However, it is also reasonable that Con-Way's actual reason for firing Tolbert was based on his efforts to assert his rights under the law. To grant summary judgment for the defendant, the court would have to accept the self-serving affidavits of Riordan, Trott, and Leathers as true. Inconsistent and arbitrary application of company disciplinary policy can support a finding of pretext. See *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 892 (7th Cir. 2001); *Williams v. City of Valdosta*, 689 F.2d 964, 975

(11th Cir. 1982). In the face of the evidence of inconsistent application of safety policy 811, including the draft safety letter and the comparators discussed above, such a credibility determination at the summary judgment stage is inappropriate. See *Morfin v. City of East Chicago*, 349 F.3d 989, 999 (7th Cir. 2003); *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) ("On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder.").

II. *FMLA Interference*

Tolbert's next claim is that Con-Way interfered with his right to return to work after a medical leave of absence, pursuant to the FMLA. The FMLA states that an employer is not allowed to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" to an "eligible employee." 29 U.S.C. § 2615(a)(1). Tolbert's eligibility is not argued by the parties, and he was an eligible employee under the statute. See 29 U.S.C. § 2611(2)(A).

Tolbert's right to reinstatement after his FMLA leave is established in 29 U.S.C. § 2614(a)(1)(A). This right is qualified under §2614(a)(3)(B), stating that an employee is entitled only to a right that he would have been entitled to had he not taken the leave. Con-Way argues that even if Tolbert had not filed for a leave of absence under the FMLA, he would not be entitled to return to his job, as he was fired for violating safety policy 811. Tolbert disputes the veracity of this reason. The issue is no different from that discussed above, so Con-Way is not entitled to summary judgment on this claim. Tolbert has presented sufficient evidence to allow a reasonable jury to find pretext, thus precluding summary judgment in favor of Con-Way.

Conclusion

Because plaintiff Tolbert has raised a genuine issue of material fact concerning defendant's decision to fire him, defendant's motion for summary judgment is hereby denied.

So ordered.

Date: June 15, 2005

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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